UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

(IN ADMIRALTY)

No. 2027.

THOMAS S. BURLEY, and ROBERT McCULLOUGH, doing business under the firm name and style of TACOMA TUG & BARGE COMPANY,

Appellants,

vs.

COMPAGNIE DE NAVIGATION FRANCAISE (a Corporation),

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, WESTERN DIVISION.

REPLY BRIEF OF APPELLANTS

JAMES M. ASHTON,
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REPLY BRIEF OF APPELLANTS

As appellee, in their brief, have not offered a single fact or argument to show that Pilot Burley did not act in good faith and as he honestly believed to be best and his only safe course, we again wish to assert that the decree against appellants under the law cannot, and should not, stand.

There are, however, some parts of appellee's brief which should be referred to; otherwise the same may unintentionally become misleading in the event of This Honorable Court being unable to read, in detail, all testimony in the Apostles. First, at page 26 of appellee's brief, it is stated, in an argumentative manner, that the first mate, Logre, could talk English. Opposing counsel knows as well as the writer that such was not the case, and that the evidence, on account of being transferred pursuant to our stipulation from cause No. 455, does not, in every case, show when an interpreter was and was not used. It is apparent, throughout the entire testimony, that the only member of the "Cecille's" crew who could speak English to any intelligent or useful extent was the captain. Pilot Burley testifies, at page 157 of the Apostles, that this same mate "did not talk any English." Captain Clift's testimony shows, as does that of all others who came in contact with the officers of the ship, that the only one upon board who could make any statement in English was the second mate,

Bourdet, and as to his knowledge, we call the court's attention to the proceedings at page 372, when his counsel was compelled, upon re-direct examination, to extricate the witness from his difficulty as to the dragging of the ship, by showing that he did not understand the questions put to him in English, and which he attempted to answer in English, and he was compelled, by his own counsel, to fall back upon the interpreter, Mr. Roche. Under these conditions, we submit that it is not only unfair for opposing counsel to lead the court to believe that the first mate was familiar with English, but it is equally unfair to throw all the blame of this unfortunate occurrence upon a well-meaning pilot, who was struggling to do his best under all circumstances, when the ship, as a matter of fact, was not properly manned, having no one on board her who, in an English-speaking port, could communicate in English upon matters of the most vital importance, and which they knew must necessarily be talked about in English before they could be carried out by the pilot.

If we have stated in our brief that the third mate was ashore when the towage occurred, it should be that he was ashore when the collision occurred, and the captain was ashore when both occurred. Surely it was not necessary for the captain to leave his ship all the afternoon of the 9th, and apparently all day on the 10th, and until after the collision, solely to sign bills of lading, if such, in fact, was what he was doing. It is further strange that Captain Annette has not accounted for his absence, and that no reasons are

given in the record for leaving the ship's command in this condition — a condition which served to greatly intensify the extraordinary difficulties under which Pilot Burley was laboring by reason of the fog.

Counsel further seeks to avoid the fault of the ship in running out too much chain, whether by reason of defective appliances or not, by quoting from the Apostles to show that they hauled in the chain to 75 fathoms by reason of Pilot Burley's orders, and, while we know that counsel would not intentionally mislead the court, yet their quotation at page 25 of appellee's brief, stopping, as it does, just short of the evidence which clinches the statement in appellants' brief in this regard, might have the effect of so misleading. If the court will kindly turn to page 237 of the Apostles, it will be noted that the very next question and answer after the words which counsel has italicized are as follows:

"Q. Heave up so as to leave four shackles out?

"A. Yes."

And, further down, on the same page:

"Q. What was your understanding when you left there as to whether or not it would be heaved up to four shackles or otherwise?

"A. It was my understanding that when they got steam they would heave up, which I have no doubt they did."

The court will readily see that, in order to place this matter fairly, the testimony which we have just quoted should be considered, and it is clear from all the testi-

mony that Burley's aim and intention was to expressly limit the anchor cable to four shackles, which is not 75 fathoms, but 60 fathoms; and a difference of 15 fathoms, or 90 feet, which in the swing of a ship in a place of the kind in question makes all the difference in the world, and it is clearly enough to have avoided the collision had the pilot's order been carried out, and it is perfectly clear from the evidence that anything greater than 60 fathoms, or four shackles, would have endangered the ship going ashore against the mud flats to the eastward and southward, as well as endangering the swinging of her dangerously near the fairway.

We respectfully submit that the argument of counsel and testimony but partially quoted at pages 29 and 30 of appellee's brief are specious in the extreme, for the purpose of showing that the ship could have been safely moved before the collision on the following day. If the witnesses, Coffin, Walker and Barlow, there quoted were willing to testify that appellants could have safely or prudently gone out and attempted the moving of the ship during the short and but partial lifting of the fog, why were they not so asked, and why have they not given their testimony? Anyone can construct a probable theory because someone could see a certain distance that the thing so seen could be moved, but not a soul has been called by appellee from the waterfront of Tacoma or elsewhere to show that it was prudent or safe for appellants to undertake the moving of the ship on the following day. We therefore respectfully re-assert that the evidence of the man in authority, the harbor-master,

Captain Mountford, quoted in our brief, should not be overthrown by reason of any probable theory as to other witnesses who merely observed the ship in a casual manner, which was the case with Walker, or for the purpose of navigating about her, which was the case with the witnesses Captains Coffin and Barlow. We again respectfully submit that Pilot Burley and his partner, the appellants, should not be subjected to such severe punishment as the payment of this large sum of money will impose upon them for having honestly and faithfully done what they believed to be best and the only safe course under the circumstances? To do so will discourage rather than encourage the best efforts of pilots, and change the existing law as to their responsibility acting without negligence, and in good faith.

JAMES M. ASHTON,
Advocate for Appellants.